DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Chameleon Marketing (H.I) Limited

Of: Unity Business Centre, Roundhay Road, Leeds, LS7 1AB

1. The Information Commissioner ("Commissioner") has decided to issue Chameleon Marketing (H.I) Limited ("CML") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is being issued because of a serious contravention of regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003.

2. This notice explains the Commissioner's decision.

Legal framework

3. CML, whose registered office is given above (companies house registration number: 08203845), is the person stated in this notice to have used a public electronic communications service for the purpose of making unsolicited calls for the purposes of direct marketing contrary to regulation 21 of PECR.

4. Regulation 21 applies to the making of unsolicited calls for direct marketing purposes. It means that if a company wants to make calls promoting a product or service to an individual who has a telephone number which is registered with the Telephone Preference Service Ltd ("TPS"), then that individual must have given their consent to that company to receive such calls.

5. Regulation 21 paragraph (1) of PECR provides that:

"(1) A person shall neither use, nor instigate the use of, a public electronic communications service for the purposes of making unsolicited calls for direct marketing purposes where-

(a) the called line is that of a subscriber who has previously notified the caller that such calls should not for the time being be made on that line; or

(b) the number allocated to a subscriber in respect of the called line is one listed in the register kept under regulation 26."

6. Regulation 21 paragraphs (2), (3), (4) and (5) provide that:

"(2) A subscriber shall not permit his line to be used in contravention of paragraph (1).

(3) A person shall not be held to have contravened paragraph (1)(b) where the number allocated to the called line has been listed on the register for less than 28 days preceding that on which the call is made.

(4) Where a subscriber who has caused a number allocated to a line of his to be listed in the register kept under regulation 26 has notified a caller that he does not, for the time being, object to such calls being made on that line by that caller, such calls may be made by that caller on that line, notwithstanding that the number allocated to that line is listed in the said register.

(5) Where a subscriber has given a caller notification pursuant to paragraph (4) in relation to a line of his—

(a) the subscriber shall be free to withdraw that notification at any time, and

(b) where such notification is withdrawn, the caller shall not make such calls on that line."

7. Under regulation 26 of PECR, the Commissioner is required to maintain a register of numbers allocated to subscribers who have notified them that they do not wish, for the time being, to receive unsolicited calls for direct marketing purposes on those lines. The Telephone Preference Service Limited ("TPS") is a limited company which operates the register on the Commissioner's behalf. Businesses who wish to carry out direct marketing by telephone can subscribe to the TPS for a fee and receive from them monthly a list of numbers on that register.

8. Section 122(5) of the DPA 2018 defines direct marketing as "the communication (by whatever means) of any advertising material which is directed to particular individuals". This definition also applies for the purposes of PECR (see regulation 2(2) PECR & Schedule 19 paragraph 430 & 432(6) DPA18).

9. Under section 55A (1) of the DPA (as amended by PECR 2011 and the Privacy and Electronic Communications (Amendment) Regulations 2015) the Commissioner may serve a person with a monetary penalty notice if the Commissioner is satisfied that –

"(a) there has been a serious contravention of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by the person, and

(b) subsection (2) or (3) applies.

(2) This subsection applies if the contravention was deliberate.

(3) This subsection applies if the person –

(a) knew or ought to have known that there was a risk that the contravention would occur, but

(b) failed to take reasonable steps to prevent the contravention."

10. The Commissioner has issued statutory guidance under section 55C(1) of the DPA about the issuing of monetary penalties that has been published on the ICO's website. The Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 prescribe that the amount of any penalty determined by the Commissioner must not exceed £500,000.

11. PECR implemented European legislation (Directive 2002/58/EC) aimed at the protection of the individual's fundamental right to privacy in the electronic communications sector. PECR were amended for the purpose

of giving effect to Directive 2009/136/EC which amended and strengthened the 2002 provisions. The Commissioner approaches the PECR regulations so as to give effect to the Directives.

12. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the Data Protection Act 2018 (see paragraph 58(1) of part 9, Schedule 20 of that Act).

Background to the case

13. CML is a company registered with the Financial Conduct Authority (FCA) as an 'appointed representative', promoting boiler replacements, and which operates under the trading styles 'payasyousaveboilers.co.uk' and 'Home Heating Centre'.

14. CML first came to the attention of the Commissioner when a number of complaints about them were identified within monthly TPS reports. The organisation identified within the complaints was the 'Home Heating Service'.

15. An initial investigation into those complaints by the Commissioner confirmed that the organisation responsible for the number detailed in the complaints was the 'Home Heating Centre'. Further and more detailed investigation revealed that the subscriber of the Call Line Identifier ("CLI") was CML, who used the contact email address 'payasyousaveboilers.co.uk'. It was apparent that three other CLIs were also allocated to CML.

16. On 5 August 2019 a letter setting out the ICO's concerns about CML's compliance with PECR, and requesting an explanation for a total of 74 complaints made to the TPS and the ICO's online reporting tool, was

sent to the company. The letter attached a spreadsheet containing details of the complaints.

17. CML responded on 21 August 2019. It confirmed that it used the trading names 'Home Heating Centre' and 'payasyousaveboilers.co.uk'.

18. The response explained that CML purchased data from third parties, stating: "…we buy in data from various data companies with assurances of GDPR compliance and TPS screening…". CML further reiterated that "we did rely on the data company to supply what we purchased up until 14-06-19 when we have subscribed to a tps checker which we use on every order." CML confirmed that "we run all data through the tps screener (since 14-6-19) and rely on the DNC list on the dialler that makes it impossible to call the number."

19. CML also related the following: "there was unfortunately a short period of around 5 weeks around 9-5-19 and 10-6-19 when [the director] left the day to day running of the telesales part of the business to someone [they] trusted. They, without [their] knowledge bought in or garnered some data in that period that was not GDPR or TPS screened."

20. CML advised that once it realised there were easily accessible TPS screeners available, it "immediately purchased one from TPS UNLIMITED on June 14th 2019 and ensured that all data going forward was screened regardless of what the supplier promised or guaranteed".

21. As part of the Commissioner's investigation, when asked for any documentation completed during the purchasing process with its data providers, CML provided sample invoices and order confirmations from its suppliers together with details of supplier websites. CML advised the Commissioner it did not have its own website.

22. In response for a request for evidence of consent to make the calls, CML went on to say that as the organisation deletes the data after 28 days it was not able to locate where the data originated from. CML explained that as it changed suppliers regularly to keep the supply fresh, the organisation does not have a continuous relationship with them so "we were really asking for a favour of them to retrospectively trawl through the numbers and match them up."

23. Analysis of the sample invoices and supplier privacy policies provided by CML demonstrated that each gives a large list of sectors that individuals can expect to receive direct marketing material about. Neither CML, payasyousaveboilers.co.uk, nor Home Heating Centre were listed as recipients of individual's data.

24. It is apparent that CML has sought to place the emphasis for TPS screening, data quality and compliance with regulations firmly with its data supplier rather than itself, and has offered no form of due diligence checks on the data supplier. Accordingly the consents relied upon by CML to engage in marketing by way of live calls were not sufficient.

25. During the course of the Commissioner's investigation it was established from call dialler records that in the period from 17 March 2019 to 2 July 2019 a total of 1,413,666 connected direct marketing calls were made to subscribers. 617,323 of these calls were registered with the TPS for more than 28 days (representing 43.6% of all calls), which led to a total of 52 complaints during the same period (26 to the TPS and 26 to the Commissioner's online reporting tool).

26. The Commissioner has made the above findings of fact on the balance of probabilities.

27. The Commissioner has considered whether those facts constitute a contravention of regulation 21 of PECR by CML and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

28. The Commissioner finds that CML contravened regulation 21 of PECR.

29. The Commissioner finds that the contravention was as follows:

> Between 17 March 2019 and 2 July 2019 CML used a public telecommunications service for the purpose of making 617,323 unsolicited calls for direct marketing purposes to subscribers where the number allocated to the subscriber in respect of the line called was a number listed on the register of numbers kept by the Commissioner in accordance with regulation 26, contrary to regulation 21(1)(b) of PECR; and

30. The Commissioner is also satisfied for the purposes of regulation 21 that these calls were made to subscribers who had registered with the TPS at least 28 days prior to receiving the calls and had not given their prior consent to CML to receive calls.

31. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

32. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulation 21 by CML's activities over a 15 week period, and this led

to a significant number of complaints about unsolicited direct marketing calls to the TPS and the ICO.

33. CML made 1,413,666 marketing calls between 17 March 2019 and 2 July and these calls were not screened against the TPS register, nor were there sufficient contractual terms in place to ensure the data's veracity upon purchase. As a result, 617,323 of these calls, representing 43.6%, were to individuals who had registered with the TPS, leading to 52 complaints.

34. The following complaints also indicate CML made multiple calls to individuals in a short space of time, despite suppression requests:

"I told the person to stop ringing this number and I would report it to ico 2nd call within the hour."

"Constantly ringing. I have 4-6 calls a day off this number. even the weekend. they even ring straight back when I cancel the call."

"They've called me 7 times in 2 days despite being told not to."

35. Although there is a spike in both complaints and calls to TPS registered numbers which corresponds with the period CML's director had left the day to day running of the telesales part of the business to another employee, a substantial number of calls outside this period, but still within the contravention period covered by this notice were made to TPS registered numbers (as high as 35% in March 2019). Therefore it is reasonable to suppose that CML was operating a negligent business model irrespective of the director's period of absence and beyond the contravention period covered in this notice.

36. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

37. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that CML's actions which constituted that contravention were deliberate actions (even if CML did not actually intend thereby to contravene PECR).

38. The Commissioner considers that in this case CML did not deliberately contravene regulation 21 of PECR in that sense.

39. The Commissioner has gone on to consider whether the contravention identified above was negligent.

40. First, she has considered whether CML knew or ought reasonably to have known that there was a risk that this contravention would occur. She is satisfied that this condition is met, given that CML's business model relied heavily on direct marketing, and the fact that the issue of unsolicited calls has been widely publicised by the media as being a problem.

41. The Commissioner has also published detailed guidance for companies carrying out marketing explaining their legal requirements under PECR. This guidance explains the circumstances under which organisations are able to carry out marketing over the phone, by text, by email, by post or by fax. Specifically, it states that live calls must not be made to subscribers who have told an organisation that they do not want to

receive calls; or to any number registered with the TPS, unless the subscriber has specifically consented to receive calls.

42. The number of calls made to TPS registered individuals accounts for 43.6% of the total call volume. This shows a blatant disregard for the legislation surrounding the making of marketing calls and suggests that CML made no or very little effort to screen the data they were using against the TPS.

43. Despite the absence of CML's director for a period of time when the majority of the contraventions occurred, he remained under a duty to keep informed of what was happening in the business and to manage the companies activities.

44. CML is registered with the FCA and therefore should have had an increased awareness of its statutory obligations, including PECR.

45. Finally, the Commissioner has gone on to consider whether CML failed to take reasonable steps to prevent the contravention. Again, she is satisfied that this condition is met.

46. Reasonable steps in these circumstances would have included ensuring that CML could evidence consents relied upon to make marketing calls; having in place a contractual arrangement with its third party data supplier to ensure that the data being purchased met the required threshold for valid consent; screening the data against the TPS register; ensuring that it had in place an effective and robust suppression list and ensuring the activities of the company were being monitored during any period of absence by the director.

47. The Commissioner is satisfied that CML failed to take reasonable steps to prevent the contravention.

48. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

49. The Commissioner has taken into account the following **aggravating features** of this case:

- The Commissioner notes that an additional 16 complaints were made about CML in a broader period commencing 18 September 2018 up to the time of the contravention. This would suggest that CML's negligent business practices had been taking place over a longer period than considered in this Notice, and when call dialler records were not available to the Commissioner.

- CMLs operation of its negligent business model was for financial gain.

50. The Commissioner has also taken into account the following mitigating factors:

- The majority of the calls at the heart of this contravention were made as a result of the actions of a 'rogue' member of staff.

- CML has since removed the 'rogue' individual left in charge of the company in the director's absence;

- CML purchased a TPS screener on 14 June 2019 to ensure future compliance;

- The Commissioner has received no further complaints about CML since 29 July 2019 which would suggest that CML is now complying with its obligations under PECR;

- CML has engaged fully with the Commissioner throughout her investigation.

51. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A(1) DPA have been met in this case. She is also satisfied that the procedural rights under section 55B have been complied with.

52. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary thinking.

53. In reaching her final view, the Commissioner considered representations received by CML on 11 November 2020.

54. Within those representations, CML advised that it had not been contacted by the TPS in relation to any complaints (as is the standard practice of the TPS each time it receives a complaint and referred to in the Notice of Intent), but had this occurred, it could have addressed any deficiencies in its practices to prevent future contraventions. The Commissioner made enquiries of the TPS regarding contact with CML, and was advised that because the complainants could not correctly identify the organisation responsible, it was unable to contact CML in relation to the complaints. Notwithstanding the above, the Commissioner remains unconvinced that knowledge of the complaints would have caused CML to adjust its practices to ensure compliance

with PECR, as evidenced by the continuing and multiple calls to subscribers who had previously asked for their details to be supressed. CML also asked the Commissioner to further consider the mitigating factors detailed previously in this Notice. The Commissioner fully considered each point when reaching her decision to issue a preliminary Notice, and as there were no new factors advanced in the representations the Commissioner was not persuaded to alter her position as expressed in the Notice of Intent.

55. The Commissioner is accordingly entitled to issue a monetary penalty in this case.

56. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.

57. The Commissioner has endeavoured to consider the likely impact of a monetary penalty on CML. Given that publicly available accounts dated back to 30 September 2019, CML were invited on 16 November 2020 to provide additional evidence of its current financial status. CML responded on 20 November 2020, indicating that updated accounts were not available, however provided the Commissioner with some further information including bank statements. Upon review of this information nothing advanced by CML by way of financial evidence persuaded the Commissioner to adjust her view as to the appropriate penalty amount.

58. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The making of unsolicited direct marketing calls is a matter of significant public concern. A monetary penalty in this case should act as a general encouragement towards compliance with the law, or at least as a

deterrent against non-compliance, on the part of all persons running businesses currently engaging in these practices. This is an opportunity to reinforce the need for businesses to ensure that they are only telephoning consumers who want to receive these calls.

59. In its representations, CML opined that the intended objective had already been achieved, however in this particular case the Commissioner considers that a monetary penalty is a proportionate and appropriate response to the finding of a serious contravention by CML.

The amount of the penalty

60. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£100,000 (One hundred thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

61. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **25 February 2021** at the latest. The monetary penalty is not kept by the Commissioner but will be paid into the Consolidated Fund which is the Government's general bank account at the Bank of England.

62. If the Commissioner receives full payment of the monetary penalty by **24 February 2021** the Commissioner will reduce the monetary penalty by 20% to **£80,000 (Eighty thousand pounds).** However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.

63. There is a right of appeal to the First-tier Tribunal (Information Rights) against:

a) the imposition of the monetary penalty and/or;

b) the amount of the penalty specified in the monetary penalty notice.

64. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.

65. Information about appeals is set out in Annex 1.

66. The Commissioner will not take action to enforce a monetary penalty unless:

- the period specified within the notice within which a monetary penalty must be paid has expired and all or any of the monetary penalty has not been paid;

- all relevant appeals against the monetary penalty notice and any variation of it have either been decided or withdrawn; and

- the period for appealing against the monetary penalty and any variation of it has expired.

67. In England, Wales and Northern Ireland, the monetary penalty is recoverable by Order of the County Court or the High Court. In Scotland, the monetary penalty can be enforced in the same manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.

Dated the 25th day of January 2021

Andy Curry
Head of Investigations
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

ANNEX 1

SECTION 55 A-E OF THE DATA PROTECTION ACT 1998

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 48 of the Data Protection Act 1998 gives any person upon whom a monetary penalty notice or variation notice has been served a right of appeal to the First-tier Tribunal (Information Rights) (the 'Tribunal') against the notice.

2. If you decide to appeal and if the Tribunal considers:-

a) that the notice against which the appeal is brought is not in accordance with the law; or

b) to the extent that the notice involved an exercise of discretion by the Commissioner, that she ought to have exercised her discretion differently,

the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.

3. You may bring an appeal by serving a notice of appeal on the Tribunal at the following address:

GRC & GRP Tribunals
PO Box 9300
Arnhem House
31 Waterloo Way
Leicester
LE1 8DJ

a) The notice of appeal should be sent so it is received by the Tribunal within 28 days of the date of the notice.

b) If your notice of appeal is late the Tribunal will not admit it unless the Tribunal has extended the time for complying with this rule.

4. The notice of appeal should state:-

a) your name and address/name and address of your representative (if any);

b) an address where documents may be sent or delivered to you;

c) the name and address of the Information Commissioner;

d) details of the decision to which the proceedings relate;

e) the result that you are seeking;

f) the grounds on which you rely;

g) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;

h) if you have exceeded the time limit mentioned above the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time.

5. Before deciding whether or not to appeal you may wish to consult your solicitor or another adviser. At the hearing of an appeal a party may conduct his case himself or may be represented by any person whom he may appoint for that purpose.

6. The statutory provisions concerning appeals to the First-tier Tribunal (Information Rights) are contained in sections 48 and 49 of, and Schedule 6 to, the Data Protection Act 1998, and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)).